(6)

Supreme Court, U.S.
FILED
JAN 3 1995
OFFICE OF THE CLERK

No. 94-900

In The

Supreme Court of the United States

October Term, 1994

BAYOU DES FAMILLES DEVELOPMENT CORPORATION, COAST QUALITY CONSTRUCTION CORPORATION, and BETTY JANE PERRIN, WIFE OF/AND RONALD J. ISAAC,

Petitioners,

v.

WEST JEFFERSON LEVEE DISTRICT,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Louisiana

PETITIONERS' REPLY BRIEF

DAVID C. LOEB
Counsel of Record
HAROLD E. MOLAISON
DANIEL E. ZELENKA, II
JACK E. MORRIS
MOLAISON, PRICE & LOEB, L.L.P.
230 Huey P. Long Avenue
Gretna, Louisiana 70053
Telephone: (504) 366-4336
Telecopy: (504) 368-6531

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

12

TABLE OF CONTENTS

Page

Table of Authorities ii

Petitioners' Reply Brief 1

(1) *Contrary to the Levee District's Assertions, the Supreme Court of Louisiana Erroneously Found the Actions of the Corps and Not Those of the Levee District Effected the Taking of Petitioners' Property* 2

(2) *Contrary to the Levee District's Assertions, the Supreme Court of Louisiana Improperly Exonerated the Levee District From Liability for the Devaluation of Petitioners' Property by Attributing that Devaluation to the Regulatory Actions of the Corps Rather than to the Levee District's Expropriations* 4

(3) *Contrary to the Levee District's Assertions, the Issue of Whether the Fair Market Value of Property With a Highest and Best Use as Investment Property Is a Proper Measure of Just Compensation Presents a Substantial Federal Question, and the Supreme Court of Louisiana's Failure to Allow Petitioners to Introduce Additional Evidence of Highest and Best Use Constitutes A Miscarriage of Justice* 6

(4) *Contrary to the Levee District's Assertions, the Federal Questions In this Case Were Timely and Properly Raised* 8

TABLE OF AUTHORITIES

Page

Charleston Fed. Sav. & Loan Ass'n v. Alderson, 324 U.S. 182 (1945) 8

Florida Rock Industries v. United States (Florida Rock IV), 18 F.3d 1560 (Fed. Cir. 1994) 7

Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) 3

MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986) 3

Orr v. Orr, 440 U.S. 268 (1979) 8

United States v. Miller, 317 U.S. 369, 63 S.Ct. 276 (1943) 8

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985) 3

No. 94-900

In The

Supreme Court of the United States

October Term, 1994

BAYOU DES FAMILLES DEVELOPMENT CORPORATION, COAST QUALITY CONSTRUCTION CORPORATION, and BETTY JANE PERRIN, WIFE OF/AND RONALD J. ISAAC,

Petitioners,

v.

WEST JEFFERSON LEVEE DISTRICT,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Louisiana

PETITIONERS' REPLY BRIEF

MAY IT PLEASE THE COURT:

Petitioners Bayou Des Familles Development Corporation ("BDF"), Coast Quality Construction Corporation ("Coast"), and Betty Jane Perrin, wife of/and Ronald J. Isaac ("the Isaacs") respectfully submit this reply memorandum in response to Respondent's Brief In Opposition to Petition For Writ of Certiorari.

(1) Contrary to the Levee District's Assertions, the Supreme Court of Louisiana Erroneously Found the Actions of the Corps and Not Those of the Levee District Effected the Taking of Petitioners' Property

In their Petition for Writ of Certiorari, petitioners first argue the Supreme Court of Louisiana erred as a matter of federal constitutional law in holding the Corps' denial of petitioners' permit application, rather than the Levee District's acceptance of the permit for a levee at Alignment E and its expropriation of the property, destroyed the value of petitioners' property. The Levee District responds in its opposing brief that the Louisiana Supreme Court did not find that the Corps' 1979 denial of petitioners' § 404 permit application effected a taking of petitioners' property, but "merely" found "that based upon the 1979 Corps' denial of the landowners' permit application, and the inclusion of the landowners' wetlands property in the park protection zone that the wetlands property had a fair market value of $500-$550 per acre" (Opposition, p. 12).

The Levee District's argument lacks merit. There is no dispute that the "developable" values of petitioners' property prior to the Levee District's expropriation averaged as high as $21,000 per acre. *See* Opinion of the Louisiana Supreme Court, 93-1718 at 26 (La.5/23/94), 640 So.2d 1258, 1279 (Petition for Writ, p. A-44). Likewise, there is no dispute that after the expropriation the property's value fell to approximately $550 per acre. *Id.* at 29, 640 So.2d at 1279 (Petition for Writ, p. A-43). Under these facts, it is beyond dispute that *either* the Corps' permit actions *or* the Levee District's expropriation deprived petitioners of essentially all economically beneficial use

of their property, thereby resulting in a "categorical" taking of the property. *See Lucas v. South Carolina Coastal Council,* 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

The Louisiana Supreme Court found "the wetlands acreage of the property had a nominal value of $550 per acre at the time of the expropriation." Opinion, 93-1718 at 34, 640 So.2d at 1285 (Petition for Writ, p. A-56-57). The Court further found petitioners "have lost the opportunity to develop their land and generate a return on their investment, not because of any action of the West Jefferson Levee District . . . , but rather as a result of federal governmental action." *Id.* at 57 n. 54, 640 So.2d at 1299 n. 54 (Petition for Writ, pp. A-97-98 n. 54). In other words, the Louisiana Supreme Court found the Levee District's expropriations of petitioners' property in 1989 did not cause the devaluation of petitioners' property. The Court instead found the Corps' 1979 denial of petitioners' permit destroyed the value of petitioners' property. The fact that the Louisiana Supreme Court did not label the Corps' actions as a "taking" does not alter the Court's necessary (and erroneous) finding that the Corps rather than the Levee District effected the taking of petitioners' property.

In light of the foregoing, it becomes obvious that the Levee District fails to rebut petitioners' argument that the Louisiana Supreme Court erred as a matter of federal constitutional law in holding the Corps' denial of petitioners' permit application destroyed the value of petitioners' property. The fact remains that under such cases as *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127, 106 S.Ct. 455, 459, 88 L.Ed.2d 419 (1985), and *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340,

348 (1986), the mere denial of petitioners' permit application by the Corps could not, as a matter of federal constitutional law, have effected a taking of petitioners' property because the permitting process continued long afterward and did not become final at least until the Levee District accepted the permit for construction of a levee along Alignment E in 1986. The Louisiana Supreme Court's finding to the contrary, resulting in its holding that petitioners "have lost the opportunity to develop their land and generate a return on their investment, not because of any action of the West Jefferson Levee District . . . , but rather as a result of federal governmental action," Opinion, 93-1718 at 57 n.54, 640 So.2d at 1299 n.54 (Petition for Writ, pp. A-97-98 n.54), clearly presents this Court with a significant federal question under the Takings Clause of the Fifth Amendment.

(2) Contrary to the Levee District's Assertions, the Supreme Court of Louisiana Improperly Exonerated the Levee District From Liability for the Devaluation of Petitioners' Property by Attributing that Devaluation to the Regulatory Actions of the Corps Rather than to the Levee District's Expropriations

Peititoners next argue in their petition that the Supreme Court of Louisiana erred as a matter of federal constitutional law in exonerating the Levee District from liability because of the Corps' regulatory activities, to which the Levee District responds in its opposition: "The landowners confuse and attempt to equate the devaluation of their property resulting from the enforcement of

federal laws and regulations by federal agencies and the taking of that property by the Levee District and paying the landowners the fair market value of their property, such as it was at the time of the expropriation, as just compensation therefore [sic]" (Opposition p. 14). The Levee District admits it "fails to follow petitioners' argument that the decision of the Louisiana Supreme Court violates their rights under the Tenth Amendment to the United States Constitution" (Opposition, p. 13).

That the Louisiana Supreme Court's decision is repugnant to the Tenth Amendment follows from petitioners' first argument and conclusion that the Corps' denial of petitioners' permit application was not final and therefore could not have effected a taking of petitioners' property. If the Corps' permit denial did not effect a taking of petitioners' property as a matter of law, then the Levee District's acceptance of the permit for construction of a levee at Alignment E and its subsequent expropriations must have destroyed all of the developable values of petitioners' property and thereby effected a categorical taking. The proof of this reasoning is that the Corps' permit denial certainly did not have the same devastating and final effect on the value of petitioners' property that the Levee District's expropriations and ultimate construction of the levee had.

Recognizing this reality, one of the Levee District's arguments throughout this litigation has been to the effect that "because the only permit offered to it for the project was for Alternate E, it is not responsible for the Landowners' losses." Trial Court's Reasons For Judgment (Petition for Writ, p. A-158). In other words, the Levee District has argued that because "the Corps made them

do it," therefore the devastating and final effect of its expropriations of petitioners' property on the value of that property should be attributed to the Corps. This is exactly the result the Louisiana Supreme Court achieved in exonerating the Levee District from liability for the devaluation of petitioners' property by attributing that devaluation to the regulatory actions of the Corps rather than to the Levee District's expropriations. For all the reasons petitioners set forth in their petition, the Louisiana Supreme Court's decision is inconsistent with the Tenth Amendment to the United States Constitution as interpreted and applied by this Court and other federal courts.

(3) Contrary to the Levee District's Assertions, the Issue of Whether the Fair Market Value of Property With a Highest and Best Use as Investment Property Is a Proper Measure of Just Compensation Presents a Substantial Federal Question, and the Supreme Court of Louisiana's Failure to Allow Petitioners to Introduce Additional Evidence of Highest and Best Use Constitutes a Miscarriage of Justice

Petitioners' third argument in their petition is that the Supreme Court of Louisiana erred as a matter of federal constitutional law in failing and refusing to consider the fair market value of the property based on a highest and best use as investment property. In its opposition, the Levee District argues that "[t]he landowners are merely seeking another shot at the apple from the Levee District" (Opposition p. 16). The Levee District fails to mention that as a result of rapid and recent

developments in federal constitutional takings law, the "apple" in this case is a moving target.

As petitioners pointed out in their petition, the United States Court of Appeals for the Federal Circuit in *Florida Rock Industries v. United States (Florida Rock IV)*, 18 F.3d 1560, 1566, 1568-70 (Fed. Cir. 1994), recognized for the first time the concept of a "compensable 'partial taking' " and also recognized that even *after* a permit denial property might retain substantial value as investment property in a market composed of willing and knowledgeable purchasers. Prior to that decision, it would have been inconceivable and pointless for petitioners to allege that the Corps' permit denial effected a partial regulatory taking prior to the Levee District's expropriations and that therefore the property's highest and best use at the time of the expropriations was for investment purposes.

Under the circumstances of this case, failure to permit petitioners to introduce additional evidence of highest and best use constitutes "a miscarriage of justice," as Chief Justice Calogero of the Louisiana Supreme Court insinuated in his dissent from the denial of rehearing. Opinion, 640 So.2d at 1305 (Petition for Writ, p. A-113). Furthermore, contrary to the Levee District's assertion, the issue of whether the fair market value of property with a highest and best use as investment property is a proper measure of just compensation under the Takings Clause of the Fifth Amendment presents a substantial federal question giving this Court jurisdiction to grant a writ of certiorari in this case. As this Court has stated, "the measure of compensation" in takings cases is a "question[] of substantive right . . . grounded upon the

Constitution of the United States." *United States v. Miller,* 317 U.S. 369, 380, 63 S.Ct. 276, 283 (1943).

(4) Contrary to the Levee District's Assertions, the Federal Questions In this Case Were Timely and Properly Raised

Finally, the Levee District argues in its opposition that petitioners have not shown that the federal questions in this case were timely and properly raised so as to give this Court jurisdiction to review the decision of the Supreme Court of Louisiana. This argument is unfounded, however, as the Louisiana Supreme Court expressly acknowledged that its decision on the merits in this case is governed by the Takings Clause of the Fifth Amendment when it stated: "While the Louisiana Constitution is specifically inapplicable to this expropriation, *the United States Constitution still applies.*" Opinion, 93-1718 at 14 n.21 (La. 5/23/94), 640 So.2d 1258, 1271 n.21 (Petition for Writ, p. A-24 n.21) (emphasis added).

This Court has held that where, as here, a highest state court assumes a federal question is properly before it and then proceeds to consider and dispose of that issue, this Court will irrebuttably presume the federal question was timely and properly raised. *Orr v. Orr,* 440 U.S. 268, 274-75 (1979); *Charleston Fed. Sav. & Loan Ass'n v. Alderson,* 324 U.S. 182, 185-86 (1945). Here, the Louisiana Supreme Court expressly acknowledged this case presents questions of federal constitutional law and then proceeded to decide the case. This Court therefore should presume the federal questions were timely and properly raised notwithstanding the fact that in denying petitioners just

compensation for the Levee District's taking of petitioners' property, the Louisiana Supreme Court ignored the jurisprudence of this Court and other federal courts interpreting and applying the Takings Clause of the Fifth Amendment.

For all of the foregoing reasons and for the reasons set forth in petitioners' Petition for Writ of Certiorari, this Court should grant certiorari in this case.

Respectfully submitted,

DAVID C. LOEB
Counsel of Record
HAROLD E. MOLAISON
DANIEL E. ZELENKA, II
JACK E. MORRIS
MOLAISON, PRICE & LOEB, L.L.P.
230 Huey P. Long Avenue
Gretna, Louisiana 70053
Telephone: (504) 366-4336
Telecopy: (504) 368-6531

Counsel for Petitioners